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No. 249

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

FIBREBOARD PAPER PRODUCTS CORPORATION,
Petitioner

v.

EAST BAY UNION OF MACHINISTS, LOCAL 1304, UNITED STEELWORKERS OF AMERICA, AFL-CIO, *et al*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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STATEMENT

This is a suit brought by the Union under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, claiming that the Company violated its collective bargaining agreement by contracting out certain work.

In its answer to the complaint, the Company asserted, as an affirmative defense, that the Union is precluded by collateral estoppel from contending that there was an agreement in effect on the date of the contracting out. The district court granted the Union's motion to strike this defense and, on interlocutory appeal, the Court of Appeals affirmed. The petition for certiorari seeks review of that decision.

The prior litigation, alleged to constitute the basis for this collateral estoppel claim, arose out of a charge filed by the Union with the National Labor Relations Board that the Company, by contracting out the work without prior notice to and discussion with the Union, had refused to bargain in violation of Section 8(a)(5) of the Act. The Board originally found no violation, 130 N.L.R.B. 1558 (1961), but on motion for reconsideration reversed itself, 138 N.L.R.B. 550 (1962). Its ultimate decision, holding that the Company had violated the Act, was affirmed by the Court of Appeals for the District of Columbia, 322 F.2d 411 (1963), and by this Court, 379 U. S. 203 (1965).

The Company does not challenge the Union's right to bring separate proceedings, one before the Board and the other in the courts, to enforce its separate statutory and contractual interests. Indeed, the Union's right to do so is by now clearly established. *Smith* v. *Evening News Assn.*, 371 U. S. 195, 197 (1962); *Carey* v. *Westinghouse Electric Corp.*, 375 U. S. 261 (1964); *United Steelworkers* v. *American International Aluminum Corp.*, 334 F.2d 147, 152-53 (5th Cir. 1964), *cert. den.* 379 U. S. 991 (1965). Nor does the Company contend that the award in the Board proceeding moots this action. The Board, in the prior litigation, provided back pay to the affected employees only for part of the period of their unemployment. Its reason for limiting its remedy would not bar a full recovery under the agreement, 138 N.L.R.B. at 555, n. 21. The Union has brought this action to obtain the additional lost wages due the employees under the agreement, for the two-year period not covered by the Board award.

The Company's sole contention with respect to the prior litigation is that there was a final determination therein that the agreement terminated on July 31, 1959; that that determination was essential to the judgment therein; and that, accordingly, the Union is barred by collateral estoppel from

contending that there was an agreement in effect on August 1, 1959, when the contracting out occurred.

The Union's motion to strike the Company's "collateral estoppel" defense was based on two grounds: (1) that the normal requirements of the collateral estoppel defense had not been met; and (2) that in any event an NLRB interpretation of a collective bargaining agreement cannot preclude judicial interpretation of that agreement in a subsequent Section 301 action.

In its original decision, affirming the striking of the defense, the court below upheld the Union's first contention that the Company had not proven the traditional elements of collateral estoppel and did not reach the Union's second contention. In its decision on rehearing, however, it adopted the Union's second contention as an alternative basis for its decision.

The Company's petition for certiorari challenges the correctness of the first basis for the decision below. It does not challenge the second, alternative basis for the decision.

ARGUMENT

1. This case presents no question of federal law worthy of this Court's attention.

There is no dispute between the parties as to the legal principles governing disposition of the Company's "collateral estoppel" defense. The "established rules of collateral estoppel" (Pet. App. 11), which the Company does not challenge, were set forth in the decision below:

> "One such rule is that a determination before it may become a basis for collateral estoppel must be a final one. [Citing cases]. It is also the rule that where estoppel by judgment is asserted, the earlier determination must have been of a question of fact essential to the earlier judgment. . . ." (Pet. App. 11).

The issue in this case is *sui generis*. The Company con-

tends that in the prior litigation there was a final determination, essential to the judgment, that the agreement terminated on July 31, 1959. The Union, on the other hand, contends that there was no final determination that the agreement terminated and that, in any event, no such determination was made essential to the judgment in the earlier case. The Court below examined all the decisions in the prior case and concluded that there was no *final* determination that the agreement terminated,[1] and that, in any event,

[1] As the court below recognized, there was a decision at an early stage in the prior litigation holding that the agreement had terminated. The context in which it arose, and the reasons why the court below found it not to be a final determination, are set forth in this footnote.

When the Board litigation was first instituted, the Union and the General Counsel contended that the Company had violated Section 8(a)(5) in two separate respects: first, by contracting out work without prior discussion with the Union (this was the issue which ultimately reached this Court), and second, by purporting to terminate the agreement without serving notices required by Section 8(d). The Trial Examiner exonerated the Company on both counts. With respect to the second count, he ruled that the agreement had terminated on July 31, 1959 by its own terms, and that, accordingly, no "8(d)" notices were required. The Board, in its original decision, affirmed the Trial Examiner's decision.

On reconsideration, however, the Board, without discussing the "8(d)" notice question at all, reversed itself with respect to the other issue; ruled that the Company had violated the Act by not discussing with the Union its plans to contract out; and issued an order favorable to the Union. The effect of this reversal, as the court below recognized, was to render unnecessary any appeal by the Union from the earlier unfavorable finding on the "8(d)" notice point.

It is hornbook law that "where a judgment is rendered by a court of first instance in favor of a party, but a particular issue is decided against him, and because the judgment is rendered in his favor he has no ground for appealing from the judgment, the finding on the particular issue decided against him is not conclusive in a subsequent action between the parties based upon a different cause of action." Restatement of the Law of Judgments, § 69(2), Comment (c). Accordingly, the court below held that the Trial Examiner's ruling on the "8(d)" notice question—and the finding of termination made in conjunction with that ruling—was not a *final* judgment against the Union, and could not bar relitigation of the termination issue.

In an attempt to escape this holding, the Company makes a half-

none of the decisions indicated that the alleged termination was essential to the judgment.[2]

The court below did not decide whether there was an agreement in effect on August 1, 1959. It held only that litigation of that question is not barred by collateral estoppel. The Company will be free to press its claim that the agreement terminated on July 31, 1959, and, if it is correct, it should prevail in this action. The decision below merely holds that the Union is not foreclosed from disputing that claim.

The decision of the court below is of no significance except to the parties hereto. It resolves a *sui generis* hassle

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hearted argument that the Union *could* have appealed this unfavorable finding, despite its over-all victory, in order to expand the scope of the Board's order. But the Board has made clear, in a virtually identical case, that the scope of its order would not be affected by the finding of an additional violation based on failure to give the "8(d)" notices. *Adams Dairy, Inc.*, 137 NLRB 815, 816 (1962):

> "The Trial Examiner found that the Respondent also violated Section 8(a)(5) by failing to comply with the termination and modification procedures prescribed by Section 8(d) of the Act.... [*T*]*he additional finding would not change the scope of the Order* and we shall therefore not pass upon such finding by the Trial Examiner." (Emphasis supplied).

The petition does not appear to challenge that portion of the decision below holding that the Trial Examiner's decision, and the original Board decision affirming him, cannot constitute the basis for a collateral estoppel claim. Certainly the "Questions Presented" do not suggest such a challenge. In any event, the decision below on this point is clearly correct, and does not merit review by this Court.

[2] In its second "question presented," the Company accuses the court below of engaging in conjecture in making the latter determination. This accusation is without merit. Whenever collateral estoppel is asserted, the court is required to determine whether the finding in the prior litigation was essential to the judgment therein. Restatement of the Law of Judgments, § 68, comment (o). The burden was on the Company to prove that the finding was essential to the earlier judgment. Scott, *Collateral Estoppel by Judgment*, 56 Harv. L. Rev. 1, 10 (1942). The Company failed to meet that burden.

over the application of acknowledged collateral estoppel principles. There is no reason for review by this Court.

2. Although this is an action for breach of a collective bargaining agreement, to be resolved by the courts under Section 301, the question which the Company seeks to litigate relates not to Section 301, but to the scope of the "duty to bargain" under Section 8(a)(5) of the LMRA:

> "Where there is in effect a bargaining contract providing for a grievance procedure culminating in arbitration, does the duty to bargain require management to negotiate with the union in advance of acting in the exercise of a right asserted by it under the contract?" (Petition, p. 2).

Congress has committed the resolution of this question—indeed of all questions involving the scope of the "duty to bargain" under Section 8(a)(5)—to the primary jurisdiction of the NLRB. But in this case the Board is not a party, nor has it had an opportunity to answer the question advanced by the Company. This Court is invited to render an interpretation of the Act which would seriously limit the Board's authority to regulate refusals to bargain, without the benefit of the Board's expertise either as decision-maker or as litigant.

The Board has in a number of decisions subsequent to *Fibreboard* discussed the scope of the duty to bargain over contracting out when there is an agreement in effect. It has not adopted the *per se* rule—advanced by the Company here—that there can be no refusal to bargain if there is an agreement in effect.[3] If this Court wishes to review the

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[3] See, e.g., *Adams Dairy, Inc.*, 137 NLRB 815 (1962), *enf. denied* 322 F. 2d 553 (8th Cir. 1963), *judgment vacated and remanded*, 379 U. S. 644 (1965); *Puerto Rico Telephone Co.*, 149 NLRB No. 84, 57 LRRM 1397, 1399 (1964). *Cf. Kennecott Copper Corp.*, 148 NLRB No. 169, 57 LRRM 1217 (1964); *Shell Oil Co.*, 149 NLRB No. 22, 57 LRRM 1271 (1964); *General Motors Corp.*, 149 NLRB No. 40, 57 LRRM 1277 (1964).

Board's reasoning in this area, it will have ample opportunity to do so when review is sought from these Board decisions. It need not, and should not, decide so portentous a question in a tangential "collateral estoppel" context, without the benefit of the Board's expertise.

3. In any event, the Company's broad legal question as to the scope of the "duty to bargain" is not presented by this case.

The Company argues that the termination of the agreement *should have been* deemed essential to the finding that it violated the Act. But what this Court might now decide concerning the impact of an agreement upon the "duty to bargain" is irrelevant so far as collateral estoppel is concerned. The test for collateral estoppel purposes is what *was* made essential to the earlier decision, not what *should have been*. As this Court stated in *Myers* v. *International Trust Co.*, 263 U. S. 64, 71, (1923):

> "In all cases . . . where it is sought to apply estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

It cannot be seriously contended that the termination of the agreement *was* made essential to the decisions in the prior litigation. This Court's discussion on the question of law before it did not once indicate that the result turned upon the existence or non-existence of an agreement, 379 U. S. at 209-215. Neither did the decisions of the Board and the Court of Appeals.

This silence is not surprising. For the fact is that the Company did not, in the prior litigation, contend that the lawfulness of its action under Section 8(a)(5), turned on

the existence or non-existence of a collective bargaining agreement. It cannot now claim collateral estoppel on an issue which, because not pressed by it, was not resolved in the prior litigation.

4. *Timken Roller Bearing Co.* v. *NLRB,* 161 F.2d 949 (6th Cir. 1947), upon which the Company now so heavily relies (Pet. pp. 6-11), is not in point. There, the Company contracted out certain work, and the employees struck in breach of contract to compel it to recapture the work. The Company stated that if the employees would end the strike and return to work, it would discuss the dispute in the grievance procedure provided for in the agreement. The Union filed a charge with the NLRB alleging that the Company was violating Section 8(a)(5). The Company defended on the gound that it was bargaining in good faith, since it was willing to discuss the dispute in the grievance procedure once the strike ended. The Court of Appeals for the Sixth Circuit agreed, 161 F.2d at 955:

> "The record discloses no categorical refusal to bargain. The company's position was that it would negotiate in respect to the causes of the strike if the breach of contract were repaired, the men put back to work and grievances filed in accordance with the grievance procedures. Indeed, the company went further, —it offered to eliminate certain steps in the procedure which might have delayed adjustment, and to pass at once to the final steps provided. This was an offer reasonably in pursuit of the bargaining process, To construe it as refusal to bargain can be justified only by the fact that the offer was not made in good faith. Not only is there no finding by the Labor Board that the proposal of the company was made in bad faith pursuant of a purpose to avoid bargaining, but there is not a scintilla of evidence that would support such a finding if made, and its earlier and subsequent bargaining history repels any inference in that respect."

The *Timken* decision does not stand for the broad proposition—asserted by the Company—that there can never be a refusal to bargain when there is a contract in effect. It holds only that, in certain circumstances, a company may fulfill its bargaining obligation by "channeling" discussions through the contractual grievance procedure. Whatever the correctness of this decision (it has not been followed in a single case in 18 years), it is totally inapplicable to the facts of this case.

Here, unlike *Timken,* the Company did not offer to resolve the dispute pursuant to the grievance procedure. Indeed, here the Union's request that the dispute be resolved through the grievance procedure was expressly rejected by the Company (Record, p. 88, *Fibreboard Paper Products Corp. v. NLRB,* October Term, 1963, No. 610).

Furthermore, here, unlike *Timken,* the Company did not offer as a defense to the refusal to bargain charge that it was willing to resolve the dispute through the grievance procedure. As we have already noted, it is the failure of the Company to make such a defense which accounts for the silence of the opinions in the earlier litigation on this point. Since the contention was not advanced in the prior litigation, there can be no collateral estoppel.

5. The decision below rests on an alternative ground which the petition does not question.

In addition to its contention that traditional requirements of collateral estoppel had not been met, the Union advanced below an alternative argument; that an NLRB interpretation of a collective bargaining agreement cannot preclude judicial interpretation of that agreement in a subsequent action under Section 301. This follows, the Union argued, from the clear Congressional mandate that disputes under collective bargaining agreements be resolved by the courts, and not by the NLRB. The legislative history on this point

was summarized by this Court in *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195, 206-07 (1962).[4]

In its original decision, the Court below expressly refrained from ruling on this contention, stating that it was unnecessary to do so because, even if a Board decision *could* constitute the basis for collateral estoppel, the Company had not satisfied "the established rules of collateral estoppel." (Pet. App. pp. 10-11).

In its decision on rehearing, however, the Court below did address itself to the question. It decided that "under the circumstances here present" an NLRB decision cannot constitute the basis for a claim of collateral estoppel:

> "As Professor Davis points out (Administrative Law, Treatise, Vol. 2 § 18.02), while the doctrine of res judicata is applicable to 'some administrative proceedings' the cases 'add up to the sound proposition that administrative decisions are sometimes res judicata and sometimes not.' Although this matter was not discussed in our original opinion it would appear to be plain that under the circumstances here present the doctrine of collateral estoppel (or res judicata, as Professor Davis calls it), would not be applicable here." (Pet. App. 17).

This alternative basis for the decision below, not questioned in the petition, stands as an independent bar to the granting of the petition for certiorari.

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[4] "Indeed, so severely is the Board limited to the adjudication of statutory rights that it has no power to adjudicate contractual disputes." *United Steelworkers* v. *American International Aluminum Corp.*, 334 F.2d 147, 152 (5th Cir. 1964), *cert. den.* 379 U. S. 991 (1965).

CONCLUSION

For the reasons set forth hereinabove, the petition for certiorari should be denied.

Respectfully submitted,

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